testation of existing policies is easily transformed into forcible resistance, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation with direct incitement to violent resistance is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists." The Circuit Court, in overruling Learned Hand and in dissolving the injunction,[17] laid down the seemingly unsound proposition that he who utters words at any time or place with the specific intent to cause a violation of the Espionage Act, is criminally liable therefor.[18] In attempting to further strengthen its position the court stated that it was powerless to reverse the decision of the postmaster unless he was clearly wrong. It is true that decisions of administrative boards or officers are final as to questions of fact, and reversible by the courts only when clearly wrong.[19] But to exclude matters from the mails on the grounds that they are criminal attempts in violation of the Espionage Act, as it originally stood, calls for a construction of the statute, which is a judicial question, clearly reviewable by the courts and reversible unless clearly right.[20]

In no case was the law of criminal attempts considered, and in only a few were the ordinary established rules of construction applied. During the Civil War, when a real menace to personal liberty presented itself, the judges fearlessly applied the law.[21] Today there are convictions; on appeal the government confesses error without opinion;[22] and those who cannot appeal go to jail, some rightfully, others perhaps wrongfully. The decisions are permeated with a laudable spirit of loyalty, but true patriotism consists as much in protecting the legal and constitutional rights of individuals as it does in giving the government an undivided and whole-hearted support.[23]

INJURIES BY TRESPASSING ANIMALS. — In the simple conception of liability that refers everything to the human will, one is held legally upon a legal transaction, in which he willed liability, or because of a wrongful act, in which he willed something culpable. But liability at one's peril for situations dangerous to the general security, without

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[17] 246 Fed. 24.

[18] The decision of the Circuit Court was so interpreted and followed by Judge Learned Hand in United States *v.* Nearing, 252 Fed. 223, and in United States *v.* Eastman, 252 Fed. 232.

[19] United States *v.* Ju Toy, 198 U. S. 253. See 32 HARV. L. REV. 433.

[20] Chin You *v.* United States, 208 U. S. 8; Gonzales *v.* Williams, 192 U. S. 1; Gegiou *v.* Uhl, 238 U. S. 620. See 32 HARV. L. REV. 433.

[21] See *Ex parte* Merryman, *supra; Ex parte* Milligan, *supra.*

[22] See Baltzer *v.* United States, U. S. Supreme Court, October Term, 1918, No. 320; Head *v.* United States, *Ibid.*, No. 321; Kornmann *v.* United States, *Ibid.*, No. 548.

[23] See Zechariah Chafee, Jr., "Freedom of Speech," 17 NEW REPUBLIC, No. 211, 66.

regard to culpability, was an obvious fact in the administration of justice. The eighteenth century was content to reconcile this form of liability with the general theory by a dogmatic fiction of representation in the case of torts of agents and servants [1] and a dogmatic fiction of negligence in the case of trespassing animals.[2] The nineteenth century remained content with the former. American courts which balked at employers' liability statutes as subversive of a fundamental principle of reason that liability can flow only from fault,[3] were satisfied with the liability of a principal for the tort of an agent on the ground that the culpability of the agent was in reason that of the principal.[4] But historical study soon showed that liability for trespassing animals was not to be explained on any theory of negligence, and so it became orthodox to explain this case and some analogous cases of liability without fault as historical survivals which were gradually disappearing as the idea of liability resulting from will was progressively realized in the administration of justice.[5]

In truth this attempt to state the whole law in terms of will and hence to state the whole law of torts in terms of culpability grew out of the historical and metaphysical jurisprudence of the last century, which conceived of progress in law as a progress from rules and doctrines in which duties and liabilities were involved in status or relation, to rules and doctrines in which "duties and liabilities flow from voluntary action and are consequences of exertion of the human will." [6] So far from being stubborn archaisms, holding on in the teeth of progress, cases of common-law liability without fault have shown positive vitality. Thus the common-law liability for trespassing cattle, which at one time seemed on the way to extinction in America, has been steadily coming back into the law.[7] It is now evident that the common-law rule was not rejected in our earlier decisions and our earlier legislation because it was in conflict with a fundamental principle of no liability without fault, but because it postulated a settled community, where it was contrary to the general security to turn cattle at large to graze, whereas in pioneer American communities vacant lands which were privately owned and those which were not owned

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[1] "'*Qui facit per alium facit per se*' is a simple untruth, except so far as it expresses the truism that one who deliberately carries out a design through the instrumentality of another is the active agent throughout." BATY, VICARIOUS LIABILITY, 7.

[2] 3 BLACKSTONE, COMMENTARIES, 211; POLLOCK, TORTS, 9 ed., 510–11.

[3] Hoxie *v.* New York R. Co., 82 Conn. 352, 73 Atl. 754 (1909); Ives *v.* South Buffalo R. Co., 201 N. Y. 271, 94 N. E. 431 (1911); Durkin *v.* Kingston Coal Co., 171 Pa. St. 193, 33 Atl. 237 (1895).

[4] One may concur in Dr. Baty's demonstration that this is a dogmatic fiction and yet not think the rule of law imposing such liability is to be rejected. The fallacy of Dr. Baty's book lies in the assumption that tort liability is of necessity a correlative of fault.

[5] "The doctrine is a stubborn archaism." POLLOCK, TORTS, 9 ed., 510, n. p.

[6] Pound, "The End of Law as Developed in Juristic Thought," 30 HARV. L. REV. 201, 210.

[7] *E. g.*, fencing statutes are held to have no application to cultivated land. Hallock *v.* Hughes, 42 Iowa, 516 (1876); Randall *v.* Gross, 67 Neb. 255, 93 N. W. 223 (1903).

could not be distinguished, and the grazing resources of the country were often its chief resources. Hence the common-law rule was for the time being inapplicable to local conditions. It is significant that as the conditions that made the rule inapplicable have come to an end, the rule has generally been reëstablished.[8] A rule that can thus reassert itself is not a moribund archaism. It must have something sound behind it.

A conspicuous case of the vitality of the common-law liability-without-fault of owners of animals is liability for injuries done by trespassing animals, while on the land wrongfully, irrespective of *scienter*. On one ground or another, the current of authority has always held the owner of the animal in such cases.[9] In some of these cases the person injured, or whose property on the land was injured, was in possession of the land trespassed upon and was allowed to recover for the injury to person or chattel property by way of aggravation of the trespass on the land.[10] But in others the action was Case,[11] and in still others the injury was to another than the owner in possession of the land.[12] In some the trespassing animal was a dog,[13] and it might be material that the owner was with him.[14] The only decision that requires a theory of aggravation of trespass to the realty to sustain recovery for damage by a trespassing animal other than damage to the land is *Van Leuven* v. *Lyke*,[15] where it was held there could not be a recovery without either an averment of trespass upon land or an averment of *scienter*.

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[8] Phillips *v.* Bynum, 145 Ala. 549, 39 So. 911 (1906); Puckett *v.* Young, 112 Ga. 578, 37 S. E. 880 (1901); Bulpit *v.* Matthews, 145 Ill. 345, 34 N. E. 525 (1893); Gumm *v.* Jones, 115 Mo. App. 597, 92 S. W. 169 (1906); State *v.* Mathis, 149 N. C. 546, 63 S. E. 99 (1908); Marsh *v.* Koons, 78 Ohio St. 68, 84 N. E. 599 (1908).

[9] Beckwith *v.* Shordike, Burr. 2092 (1767); Lee *v.* Riley, 18 C. B. N. S. 722 (1865); McClain *v.* Lewiston Fair Ass'n, 17 Idaho, 63, 79, 104 Pac. 1015 (1909); Green *v.* Doyle, 21 Ill. App. 205 (1886); Decker *v.* Gammon, 44 Me. 322 (1857); Angus *v.* Radin, 2 South (N. J.) 815 (1820); Van Leuven *v.* Lyke, 1 N. Y. 515 (1848); Dolph *v.* Ferris, 7 Watts & Sergt. (Pa.) 367 (1844); Goodman *v.* Gay, 15 Pa. St. 188 (1850); Troth *v.* Wills, 8 Pa. Sup. Ct. 1 (1898); Chunot *v.* Larson, 43 Wis. 536 (1878); Doyle *v.* Vance, 6 Vict. L. R. (Law) 87 (1880). *Contra*, Sanders *v.* Teape, 51 L. T. N. S. 263 (trespassing dog) (1884); Bischoff *v.* Cheney, 89 Conn. 1 (trespassing cat) (1914); Peterson *v.* Conlan, 18 N. D. 205, 119 N. W. 367 (1909).

[10] Beckwith *v.* Shordike, Burr. 2092 (1767); Lee *v.* Riley, 18 C. B. N. S. 722 (1865); Van Leuven *v.* Lyke, 1 N. Y. 515 (1848); Dolph *v.* Ferris, 7 Watts & Sergt. (Pa.) 367 (1844); Chunot *v.* Larson, 43 Wis. 536 (1878). In the last case the court says: "The ground of liability rests upon a breach of the close, and the killing of the cow is alleged by way of aggravation of damages" (p. 541). In Van Leuven *v.* Lyke, *supra*, the court says: "The breaking and entering the close . . . is the substantive allegation, and the rest is laid as a matter of aggravation only" (p. 517).

[11] Decker *v.* Gammon, 44 Me. 322 (1857); Green *v.* Doyle, 21 Ill. App. 205 (1886); Angus *v.* Radin, 2 South (N. J.) 815 (1820) (*certiorari* from a magistrate's court, which had no jurisdiction of trespass *quare clausum*).

[12] McClain *v.* Lewiston Fair Ass'n, 17 Idaho, 63, 104 Pac. 1015 (1909); Troth *v.* Wills, 8 Pa. Sup. Ct. 1 (1898).

[13] McClain *v.* Lewiston Fair Ass'n, 17 Idaho, 63, 104 Pac. 1015 (1909); Green *v.* Doyle, 21 Ill. App. 205 (1886); Doyle *v.* Vance, 6 Vict. L. R. (Law) 87 (1880).

[14] Woolf *v.* Chalker, 31 Conn. 121, 128 (1862) (*semble*).

[15] 1 N. Y. 515 (1848).

Of the decisions in which recovery for injury by the trespassing animal in the absence of *scienter* was denied, *Cox* v. *Burbidge*,[16] which is commonly cited as requiring *scienter* in case of an injury by a trespassing animal,[17] may be distinguished, as will be seen presently; *Sanders* v. *Teape*[18] was an injury by a trespassing dog, and *Bischoff* v. *Cheney*[19] an injury by a trespassing cat, so that they involve the question whether a dog or cat, going on lands by itself, may give rise to an action of trespass,[20] while in *Peterson* v. *Conlan*[21] the plaintiff was but a licensee on the land (and so might well be held to take risks to which the owner and his invitees would not be subject), and the value of the court's discussion is impaired by its supposition that *Rylands* v. *Fletcher*,[22] which it cites along with *Losee* v. *Buchanan*[23] as a decision to the same effect, is an authority for requiring negligence as a basis of liability.

In *Cox* v. *Burbidge*, defendant's horse, while running at large on the highway, kicked plaintiff. It was held there was no liability without proof of *scienter*. No doubt this might be explained on the theory that liability for trespass on land by animals is a historical anomaly, and for the rest liability must depend on proof of culpability in allowing an animal to run at large when its known disposition made it reasonable to anticipate that someone would be injured. But such an explanation does not consist with the tendency of the English courts, as shown by *Baker* v. *Snell*,[24] to insist on absolute liability in case of injuries by animals. And *Cox* v. *Burbidge* might be reconciled with the cases where the owner was held for injuries inflicted by the animals while trespassing on another's land by observing that so long as the horse was grazing by the roadside, even if a trespasser on the highway, if gentle it was in the ordinary run of things no danger to the general security. One who uses the highway takes the risk of many things which are normal incidents of general use of the highway.[25] Even if the horse was there wrongfully, the wrongful presence of a gentle horse may be a risk of the highway, when it cannot be said to be a risk taken by a landowner on his own premises. In the latter case the law requires the owner of an animal to keep his animal off of the land of others, where in the ordinary course of things they are sure to do some sort of damage, at his peril of answering for the damage actually done.

Such is in effect the result of the latest case of the sort. In *Theyer*

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[16] 13 C. B. N. S. 430 (1863).
[17] *E. g.*, POLLOCK, TORTS, 8 ed., 497.
[18] 51 L. T. N. S. 263 (1884).
[19] 89 Conn. 1 (1914).
[20] That trespass does not lie in such a case, Brown *v.* Giles, 1 C. & P. 118 (1823); Woolf *v.* Chalker, 31 Conn. 121, 128 (1862) (*semble*); Bischoff *v.* Cheney, 89 Conn. 1 (1914); Buck *v.* Moore, 35 Hun (N. Y.) 338 (1885); Van Etten *v.* Noyes, 128 App. Div. 406, 112 N. Y. Supp. 888 (1908); McDonald *v.* Jodrey, 8 Pa. Co. Ct. 142 (1890). See Read *v.* Edwards, 17 C. B. N. S. 245, 260 (1864). *Contra*, Chunot *v.* Larson, 43 Wis. 536 (1878).
[21] 18 N. D. 205, 119 N. W. 367 (1909).
[22] L. R. 3 H. L. 330 (1868).
[23] 51 N. Y. 476 (1873).
[24] [1908] 2 K. B. 352, 355.
[25] Compare what is said in Tillett *v.* Ward, 10 Q. B. D. 17, 20 (1882).

v. *Purnell*,[26] defendant's sheep trespassed on plaintiff's land, where they developed scab, as a result of which they were interned on plaintiff's land along with plaintiff's own sheep. Plaintiff was allowed to recover the whole damage, without proof of *scienter*. *Cox* v. *Burbidge* was distinguished on the ground that there the injury was not, while here it was a "natural" result of the trespass, and on the ground that there the plaintiff had no case for trespass, while here he had such a case with matter in aggravation of the damage. *Cooke* v. *Waring*[27] was distinguished on the latter ground. As to the first ground the artificiality of the uses of "natural" in this connection has been pointed out.[28] About all that can be made out from the decisions is that cases where a recovery has been allowed involve "natural" results, wherefore a recovery; while those in which it was not allowed do not involve such results, wherefore no recovery. As to the other ground, it seems futile to distinguish between an injury to the owner of the land, who could bring an action of trespass *quare clausum*, and one to his mother, living with him on the land, who could not.[29] The strongest argument against liability without *scienter* in these cases is in the dissenting opinion in *Troth* v. *Wills*.[30] But in the case there put of injury to a child of the landowner by a trespassing pet lamb or by a trespassing hen (assuming that the owner of the animal would be liable in trespass for an invasion of another's land by a hen),[31] if it is the duty of the owner of the animal to keep it off of the neighbor's ground, may not the latter reasonably assume that the animal will not be there, and allow the child to act accordingly? Ought we to ask the owner of land to take the risk of another's stray animal which the other is bound to keep off?

Theyer v. *Purnell*, in its result and in refusing to apply *Cox* v. *Burbidge*, is significant as one of many recent cases which are compelling us to revise the nineteenth-century theory of liability.

EFFECT OF OWNERSHIP OF ALL THE STOCK OF ONE CORPORATION BY A SECOND CORPORATION; LIABILITY OF A PARENT CORPORATION FOR THE DEBTS OF A SUBSIDIARY CORPORATION; SUBSIDIARY CORPORATIONS AS AGENTS. — The recent case of *New York Trust Co.* v. *Carpenter*[1] presented the following state of facts: The Wheeling & Lake Erie Railway Company owned a controlling interest in the Wheeling, Lake Erie and Pittsburgh Coal Company. The coal company mined coal which was used as fuel by, or shipped over the lines of, the railway company. Both companies were in the hands of receivers. There were outstanding against the coal company certain mortgage bonds (and also certain

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[26] [1918] 2 K. B. 333.

[27] 2 H. & C. 332 (1863).

[28] MAYNE, DAMAGES, 8 ed., 77. Compare other artificial uses of this word, SALMOND, TORTS, 4 ed., § 61, note 13.

[29] Compare the remarks of Phillimore, J., on an analogous situation in Dulieu *v.* White, [1901] 2 K. B. 669, 684–85.

[30] 8 Pa. Sup. Ct. 1 (1898).

[31] See State *v.* Neal, 120 N. C. 613, 27 S. E. 81 (1897).

[1] 250 Fed. 668 (C. C. A., 6th Circ.) (1918).